Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-246

JAMES McCABE, individually and in a representative capacity on behalf of a class of persons consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving sale, possession or control of marijuana,

Petitioner,

vs.

JAMES BURGESS, State's Attorney for Champaign County; and JAMES SKELTON, Champaign County Treasurer; and LAWRENCE JOHNSON, State's Attorney for Champaign County from 1968 through 1972; and CHAMPAIGN COUNTY, a body corporate and politic,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Respondent, Champaign County, a body corporate and politic, prays that this Honorable Court deny the Petitioner's request for a Writ of Certiorari.

STATEMENT OF THE CASE

In order to further clarify the record before this Honorable Court, the Respondent would state the following facts.

Subsequent to the filing of the original complaint by the

Petitioner (July 31, 1975), several motions to dismiss as to individual defendants were filed. Motions to dismiss on behalf of Defendants James Burgess, James Skelton and Lawrence Johnson were heard and allowed. The only Defendant (Respondent) before this Court is Champaign County (R.15).

On May 23, 1977, the trial court granted the Defendant's motion to dismiss concluding that all the prerequisites necessary for the maintenance of a class action had not been met by the Petitioner.

During the pendency of the Petitioner's appeal to the Fourth District Appellate Court of Illinois, Public Act 80-809 became law and added sections 57.2 through 57.7 to the Civil Practice Act (Illinois Revised Statutes of 1977, Chapter 110, Sections 57.2-57.7). The Illinois Supreme Court held in *Steinberg v. Chicago Medical School,* 69 Ill. 2d 320, 371 N.E. 2d 634, 13 Ill. Dec. 699 (1977), that the new sections of the Illinois Civil Practice Act were procedural in nature and therefore applied to all pending litigation. Applying the criteria established by Sections 57.2-57.7, the Illinois Supreme Court affirmed the trial court's conclusion that the Petitioner had not met all the prerequisites necessary for a class action. *(McCabe v. Burgess,* 75 Ill. 2d 457, 389 N.E. 2d 565, 27 Ill. Dec. 501, 1979).

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. No federal constitutional question was seasonably raised in the Illinois courts.

The Petitioner, pursuant to his amended complaint (Appendix A), requested the right to notify members of an "alleged class", to vacate any judgments of conviction, to collect fines paid and to receive compensation for the plaintiff's counsel. The trial court dismissed the plaintiff's amended complaint. In its discretion, the trial court found that: 1) the plaintiff did not demonstrate that the number of possible class members was so great as to render separate litigation impossible or impractical; 2) the plaintiff did not adequately demonstrate his ability to represent the class; 3) there were no remaining questions of law or fact common to all parties; and 4) there would be no increased judicial efficiency through the use of a class action.

The issue presented before the Fourth Appellate Court (Appendix B) and the Illinois Supreme Court (Appendix C and D) was also the validity of the trial court's refusal to certify a class action. There was never any argument or evaluation of the trial court's decision or the Illinois Class Action Statute in terms of equal protection and due process. The issue presented by the Petitioner, although a clever attempt to manufacture a federal constitutional question, is really a determination whether a trial court has abused its discretion. This allegation of abuse of trial court discretion is not a constitutional issue. The Federal courts have considered a similar type of ruling pursuant to Federal Rule 23 and reverse only if there is clear abuse.

> "Class certification under Federal Rule 23 of the Federal Rules of Civil Procedure is a matter within the discretion of the trial court. *(Montgomery v. Rumsfeld,*

[9th Cir. 1978], 572 F. 2d 250, 255; *City of New York v. International Pipe & Ceramics Corp.* [2d Cir. 1969], 410 F. 2d 295, 298.) When the trial court applies the criteria of Rule 23 to the facts of the case, it 'has a broad discretion in determining whether the action may be maintained as a class action and its determination should be given great respect by a reviewing court.' (3B J. Moore, Federal Practice sec. 23-437 [2d ed. 1978].) Only a clear abuse of discretion or an application of impermissible legal criteria as shown justifies a reversal of the trial court. *(Yamamoto v. Omiya* [9th Cir. 1977], 564 F. 2d 1319, 1325; *Carey v. Greyhound Bus Co.* [5th Cir. 1974], 500 F. 2d 1372, at 1380.)" *(McCabe v. Burgess,* 75 Ill. 2d 457 at 464, 389 N.E. 2d 565, 27 Ill. Dec. 501 [1979].)

The Petitioner's arguments on freedom of association, equal protection and due process were never presented to the trial and Illinois Appellate Courts. The Illinois Supreme Court succinctly stated the issue:

> "The primary issue presented for review is the validity of the trial court's refusal to certify a class action." *(McCabe v. Burgess,* 75 Ill. 2d 457 at 461-462, 389 N.E. 2d 565, 27 Ill. Dec. 501 [1979].)

The long-established general rule is that the attempt to raise a federal question after judgment comes too late unless the state trial court has been presented and decided the federal question. In the case of *Herndon v. Georgia,* 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935), the defendant challenged his criminal conviction before the United States Supreme Court on due process grounds which were never raised in the State courts. His appeal was dismissed by the U. S. Supreme Court:

> "We find it unnecessary to review the points made, since this court is without jurisdiction for the reason that no federal question was seasonably raised in the Court below or passed upon by that court." *(Id.* at 442).

In *Cardinale v. Louisiana,* 394 U.S. 437 at 438 and 439, 89 S.Ct. 1162, 22 L.Ed. 2d 398, (1969), a defendant accused of murder objected to the admission of allegedly irrelevant and prejudicial parts of his confession. He also challenged the state statute which required that all confessions be admitted into evidence in their entirety as being unconstitutional.

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller v. Nicholls,* 4 Wheat. 311, 315 (1819), and since *e.g., Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.,* 360 U.S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 154, 160-163 (1945); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434-435 (1940); *Whitney v. California,* 274 U.S. 357, 362-363 (1927); *Dewey v. Des Moines,* 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis,* 20 Wall. 590 (1875).

In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio,* 385 U.S. 92 (1966), they should be given the first opportunity to consider them.

In view of the petitioner's admitted failure to raise the issue he presents here in any way below, the failure of the state court to pass on this issue, the desirability of giving the State the first opportunity to apply its statute on an adequate record, and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to petitioner, the writ is dismissed for want of jurisdiction." *(Cardinale v. Louisiana,* 394 U.S. 437 at 438, 439, 89 S.Ct. 1162, 22 L.Ed. 2d 398, [1969].)

In this cause the Petitioner, like the defendant in *Cardinale,* requests a review pursuant to 28 U.S.C. §1257 (3). A review of the pertinent prior requests made and decisions rendered by the Illinois Courts clearly establishes that the Petitioner's constitutional arguments were never presented to the State courts. Therefore, the Petitioner's request for certiorari should be denied.

II. Petitioner's request was not a proper class action.

First, Respondent submits that the request for certiorari should be denied for the reasons stated in our Point I. Furthermore, if this Court were to look at the Illinois Supreme

Court decision, it will conclude that Petitioner's actions did not constitute a proper class. In reality, the only reason the Petitioner sought to designate his cause of action a "class action" was so that he could notify persons affected by *McCabe* and *Meyerowitz, (People v. McCabe,* 49 Ill. 2d 338, 275 N.E. 2d 407, 1971; *People v. Meyerowitz,* 61 Ill. 2d 200, 335 N.E. 2d 1, 1975) and so that his attorney could collect a percentage of all fines previously paid. There is no basis to contend that a right of association has been violated.

As previously stated, Petitioner never claimed before the Illinois courts that the trial court's decision infringed upon his freedom to associate with others. Freedom of association is not equivalent to the right to notify total strangers. In this cause the Petitioner is really asking this Court for permission to solicit potential clients and his recognition of that fact is shown by his arguments in Point I of his Petition. The Petitioner has not in any way been prevented from redressing his grievance. In fact, the Illinois Supreme Court has granted him the relief requested and the Petition recognizes this but seeks to tell others about it (p. 9 of Petition). The right of association is not involved in the Petitioner's request for permission to notify other people of the Illinois Supreme Court's action. As the trial court noted on its written opinion (Petitioner's Appendix C-2):

> He (the Petitioner) "has no right or interest in the single act of notification of others who might be entitled to similar relief. Although notice is a clear element of a class suit, the simple desire to notify other potential claimants is not justification, in and of itself, for the maintenance of a class action."

The cases cited by the Petitioner hold that collective activity undertaken to obtain meaningful access to the

Courts is a fundamental right. This fundamental right has already been protected and the only issues remaining are:

> ". . . questions which would affect only individual members of the class, such as the nature of the offense of which they were convicted and the amount of fines and costs paid." *(McCabe v. Burgess,* 75 Ill. 2d 457 at 466, 389 N.E. 2d 565, 27 Ill. Dec. 501 [1979].)

The Petitioner's equation that freedom of association is the need to notify all people is unsound. For centuries our system of justice has relied upon the presumption that "all men know the law." The true import of the Petitioner's argument when taken to its logical conclusion would require Congress to notify each and every individual citizen of the United States of each and every law enacted. Every court would also be required to notify all potentially interested persons of its decision or risk a violation of the person's right to freedom of association.

There has been no restriction of the Petitioner's rights to associate by the court decisions in this cause. Any right to notification is not synonymous with freedom to associate and, therefore, the trial court did not abuse its discretion in dismissing the Petitioner's class action suit.

III. There has been no denial of due process to the Petitioner by the action of the Illinois courts.

As previously stated, the Petitioner's claim must fail since he did not seasonably raise this due process issue before the Illinois courts. The Petitioner did not contend in the State court that he was being denied the opportunity to be heard. The facts show conclusively that the Petitioner has been afforded his procedural due process.

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." (*Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 92 S.Ct. 2701 at 2705, 33 L.Ed.2d 548 [1972].)

The Petitioner has been afforded his hearing in court and is entitled to have his conviction vacated and to have any fine paid refunded to him. There has been no lack of opportunity to be heard. Likewise, the Petitioner has been notified of his rights by the Illinois Supreme Court decisions in *McCabe* and *Meyerowitz.*

The Petitioner's reliance on the *Neely* case (*Neely v. United States,* 546 F.2d 1059 [3rd Cir. 1976]) is misplaced. Prior to the filing of the class action in *Neely,* the United States Supreme Court had found a federal criminal statute unconstitutional and had given that decision full retroactivity. No prior decision had determined the right of those convicted under the unconstitutional statute to recover fines and costs. The *Neely* court concluded that there was an important common question of law presented for resolution. In this case, the questions of law and fact that the members of the purported class share in common have all been resolved. The remaining questions are individual factual matters which are not common to each member of any alleged class. They are: 1) was the purported class member in fact convicted under the relevant portion of the Uniform Narcotic Drug Act held unconstitutional; and 2) what sentence was imposed by the trial court on that individual; and 3) does that person wish to avail himself of the relief granted by *Meyerowitz.* Just as these questions which remain to be answered are individual and require the identification and examination of each court file involved, so too does the granting of relief to each person since an order must be entered in each individual case vacating the conviction and returning the exact amount

of money which each person had paid as his/her fine and costs.

From *McCabe* and *Meyerowitz* clear access to the courts has been established. All aggrieved persons will be heard by the courts. Anyone aggrieved must simply present himself/herself, show the void conviction and request a full refund. No judicial economy would be accomplished by a class action. No common questions of fact or law remain which predominate over any questions affecting only individuals. There has been no due process violation by the Illinois judicial proceedings.

IV. There was no violation of the Petitioner's equal protection rights.

Again, the Petitioner requests a writ of certiorari for an issue never presented to the Illinois Courts. Pursuant to our previous arguments, Respondents would again submit that the Petitioner failed to raise the issue he presents in any way below, that the State court did not pass on this issue and that it is desirable to give the State the first opportunity to consider such matters.

Furthermore, there has been no denial of the Petitioner's access to the courts. The Illinois Supreme Court in *People v. Meyerowitz,* 61 Ill.2d 200, 335 N.E.2d 1 (1975) held that all people convicted under Section 22-40 of Chapter 38 of the Uniform Narcotic Drug Act were entitled to a return of any fines paid as a result of their conviction. Any person affected by that decision can request a refund. Each case would have to be reviewed individually to determine whether and for what offense a conviction was entered and whether any fines or costs were paid. The Champaign County Courthouse is accessible for anyone who wants the above-described relief. The decision of the Peoria Circuit Court presents no precedent for the Illinois higher courts, nor for

this Court and clearly does not deny the Petitioner any equal protection rights.

There is nothing illusory about the remedy given to all people affected by the *McCabe and Meyerowitz* decisions. Any person convicted of the former section 38 of the Uniform Narcotic Drug Act can present himself/herself before a Champaign County Judge and obtain the immediate individual treatment his/her case warrants. There would be no filing fees involved in these criminal matters and the Petitioner's analogy to Boddie and Carter is misplaced. The Illinois courts clearly stated:

> "We are of the opinion that the money, having been received in payment of fines imposed as an incident to judgments of conviction, should be ordered refunded as an incident to the vacation of the judgments under which it was ordered paid." (*People v. Meyerowitz,* 61 Ill.2d 200, 335 N.E.2d 1 at 8 [1975].)

The Petitioner's fundamental rights to association, petition and meaningful access to the courts have not been burdened. The Illinois Supreme Court provided an easy system for each individual to have his conviction vacated and any fines and costs paid by him to be refunded. There has been no Equal Protection violation.

CONCLUSION

The Petitioner's Request for a Writ of Certiorari presents no federal constitutional question which was seasonably raised in the Illinois courts. The trial court properly exercised its discretion and determined that the Petitioner did not have a class action. There were no remaining issues of law or fact to be determined. The access of any aggrieved person is now easy and simple. Each person must notify the court system in Champaign County of his or her erroneous conviction and request the reimbursement of any fines paid.

For the reasons stated heretofore, Respondent respectfully requests a denial of the Petition for a Writ of Certiorari.

Submitted by:

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APPENDIX

Appendix A-1

PRAYER OF PLAINTIFF'S AMENDED COMPLAINT:

WHEREFORE, the Plaintiff and all other members of the same class pray for the following relief:

a. That plaintiff, James McCabe, by his attorneys, Auler Law Offices, be granted freedom to notify the said members of the said class of their legal position and potential remedies such that they choose whether or not to opt out of the said class action, and that plaintiff be permitted access to the necessary files and information concerning the names and addresses of the members of the class to achieve the said notice, and that discovery be authorized by the court for the attorney of plaintiffs to determine said notice.

b. That the judgments of convictions heretofore entered against them for violation of sub-paragraphs (2), (3), (5) or (6) of paragraph 22-40 of Chapter 38, 1969 Illinois Revised Statutes be vacated and set aside.

c. That following notification of the class, as to who do not opt out of the class, the Champaign County Treasurer and Champaign County State's Attorney, shall render an accounting of all fees, costs and fines collected from the plaintiff and other members of the same class and the monetary value of all days the plaintiff and other members of the same class were imprisoned and, further, that said defendants shall supervise the refund of said sums to the persons entitled thereto.

d. That Auler Law Offices be awarded reasonable and proper attorney fees from the monies to be refunded to the plaintiff and other members of the same class.

Appendix B-1

ISSUES PRESENTED BY THE PETITIONER TO FOURTH DISTRICT APPELLATE COURT

NO. 14486
IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

JAMES McCABE, individually and in a representative capacity on behalf of a class of persons, consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving the sale, possession, or control of marijuana, Plaintiff-Appellant, vs. JAMES BURGESS, State's Attorney for Champaign County; and JAMES SKELTON, Champaign County Treasurer; and LAWRENCE JOHNSON, State's Attorney for Champaign County from 1968 through 1972; and CHAMPAIGN COUNTY, a body corporate and politic, Defendants-Appellees.	Appeal from the Circuit Court of Champaign County, Illinois No. 75-C-785 HONORABLE HAROLD L. JENSEN Judge Presiding

BRIEF OF PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

Appendix B-2

NATURE OF THE CASE

Plaintiff-Appellant, James McCabe, brought an action, both individually and as a class action to have the criminal records of the class members expunged and to have their fine monies returned. The trial court found that the case was an improper one for a class action and granted defendant's motion to dismiss plaintiff's complaint. From this dismissal, plaintiff appeals.

Notice of Appeal was filed June 21, 1977.

ISSUES PRESENTED

I. Whether the trial court erred in dismissing plaintiff's complaint on the basis that it failed to state proper grounds for a class action.

A. Whether the trial court erred in finding that the number of potential class members was not large enough to justify a class action.

B. Whether the trial court erred in finding that the plaintiff had not adequately demonstrated his ability to represent the class.

Appendix C-1

ISSUES PRESENTED BY THE PETITIONER
TO THE ILLINOIS SUPREME COURT

NO. 50676
IN THE
SUPREME COURT OF ILLINOIS

JAMES McCABE, individually and in a representative capacity on behalf of a class of persons, consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving the sale, possession, or control of marijuana,
Plaintiff-Appellant,

vs.

JAMES BURGESS, State's Attorney for Champaign County; and JAMES SKELTON, Champaign County Treasurer; and LAWRENCE JOHNSON, State's Attorney for Champaign County from 1968 through 1972; and CHAMPAIGN COUNTY, a body corporate and politic,
Defendants-Appellees.

Appeal from the
Circuit Court of
Champaign County, Illinois

No. 75-C-785

HONORABLE
HAROLD L. JENSEN
Judge Presiding

BRIEF OF PLAINTIFF-APPELLEE

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ORAL ARGUMENT REQUESTED

Appendix C-2

ISSUE PRESENTED FOR REVIEW

I. WHETHER the trial court committed error by failing to certify this cause as a class action.

A. WHETHER Plaintiff is a suitable representative of the purported class.

B. WHETHER there is a common question of fact or law shared by all members of this class.

C. WHETHER the proposed class meets the numerosity requirement.

D. WHETHER the resolution of this matter through a class action suit is the fairest and most efficient means of adjudicating this cause.

Appendix D-1

ISSUES PRESENTED BY THE PETITIONER AT HIS REQUEST FOR REHEARING BEFORE THE ILLINOIS SUPREME COURT

NO. 50676
IN THE
SUPREME COURT OF ILLINOIS

JAMES McCABE, individually and in a representative capacity on behalf of a class of persons, consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving the sale, possession, or control of marijuana, Plaintiff-Appellant, vs. JAMES BURGESS, State's Attorney for Champaign County; and JAMES SKELTON, Champaign County Treasurer; and LAWRENCE JOHNSON, State's Attorney for Champaign County from 1968 through 1972; and CHAMPAIGN COUNTY, a body corporate and politic, Defendants-Appellees.	Appeal from the Circuit Court of Champaign County, Illinois No. 75-C-785 HONORABLE HAROLD L. JENSEN Judge Presiding

PRAYER

Petitioner, James McCabe hereby petitions for rehearing of this cause and asks that this Court reverse its decision and affirm the decision of the Appellate Court of Illinois for the Fourth Judicial District ordering certification of the plaintiff class.

Appendix D-2

GROUNDS FOR REHEARING

1. This honorable Court mischaracterized the question common to the members of this class.

2. Improper standards were applied in determining the inappropriateness of a class action in the instant matter.

3. Consistency in judicial decisions would not be served by allowing the identical suit to proceed as a class action in another county of this State while denying such a procedure in Champaign County.